In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 792

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Atlanta Joint Terminals (AJT) is an unincorporated terminal service agency created in 1907 by appellant, the Louisville & Nashville Railroad Company (L&N), and two carriers controlled by L&N to be jointly used and operated by them in connection with

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their terminal operations in Atlanta, Georgia (J.S. App. 18a, 29a). On March 1, 1957, the Interstate Commerce Commission approved a merger between appellant and the Nashville, Chattanooga, and St. Louis Railway (NC&StL). 295 I.C.C. 457. Pursuant to § 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. 5(2)(f),[1] the Commission protected appellant's employees with the formula of protection that it had used in other cases. See, *e.g.*, *Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 171.

Appellant brought this action in a three-judge district court to enjoin and set aside the Commission's order insofar as it had imposed protective conditions with respect to employees of AJT. The district court suspended action on appellant's complaint (J.S. App. 3a) after the Commission reopened the proceeding on its own motion "to determine the nature and organizational character of [AJT], the relationship of it and its employees, if any, to the [L&N], and the extent to which, if any, our report and order herein of March 1, 1957, should be modified insofar as the protective conditions prescribed therein were made applicable to the employees of [AJT]" (J.S. App. 3a, 19a–20a).

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[1] Section 5(2)(f) provides in pertinent part:

"As a condition of its approval [of a combination or consolidation of carriers] * * * the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment * * *."

After further hearings, the Commission issued a new order on October 26, 1961 (J.S. App. 19a–32a; 312 I.C.C. 676). It discussed in detail AJT's organization and operations and concluded from all the facts of record that "the employees of [AJT] must be regarded as being, in reality, joint or common employees of the [L&N] and its affiliated carriers, * * * with which it created and bears ultimate responsibility for the operation of the terminal" (J.S. App. 30a). It supported its conclusion with findings that AJT's operations were controlled jointly and directly by management representatives of L&N and its affiliates; that these carriers shared the costs of its operation on a pro rata basis; and that their power of control and management over AJT's organization and operations included ultimate control over AJT's employees (J.S. App. 29a–30a). Hence, even though AJT might be considered a carrier for some regulatory purposes under the Act, its employees, because of their relationship to appellant, were entitled to the benefit of the employee protective conditions imposed by the Commission on appellant (J.S. App. 30a–31a).

The district court sustained the Commission's order. It held that no error of law had been committed, that the Commission's action was not arbitrary, capricious or an abuse of discretion, and that the Commission's findings of fact were supported by substantial evidence (J.S. App. 11a; 244 F. Supp. 337 (W.D. Ky.)).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The decision below is clearly correct and should be affirmed.

Congress' plain intent in enacting § 5(2)(f) of the Interstate Commerce Act (note 1, *supra*) was to protect railroad employees against the grave employment dislocations that often accompany railroad mergers. The Commission's decision in the present case carries out this intent. Applying its expert knowledge and experience in the area of railroad employment (compare 45 U.S.C. 151 Fifth), the Commission found that AJT was so far the creature of L&N and the other carriers (L&N affiliates) which had created it that its employees should be deemed employees of L&N in order to effectuate the protective purposes of § 5(2)(f). As the record clearly shows (J.S. App. 29a–30a), AJT is an unincorporated terminal service agency created by L&N and its affiliated carriers to be used and operated in common by them. Its operations are controlled directly by management representatives of these carriers. The parent carriers share the costs of its operation on a pro rata basis. Fiscal and accounting activities of AJT, including the filing of reports with various federal and State tax and regulatory agencies, are performed by one of the parents. AJT has no bank account; payment of employees' wages and of claims for injuries is made by drawing against the bank accounts of one of the parents. In the agreement establishing AJT, its employees are termed joint or common employees. The parent carriers are parties in all litigation involving AJT.

In the circumstances, it would be manifestly unrealistic to absolve L&N of responsibility for the merger's impact on AJT's employees on the formalistic theory that, since AJT is recognized as a carrier and as an employer for some purposes, it must be recog-

nized, contrary to business and economic reality, as sole employer for all purposes. That, nevertheless, is the thrust of appellant's argument: the Commission, as a matter of law, cannot concede AJT's existence as a carrier or employer for any purpose under the Act yet find that AJT's employees are also employed by the L&N for purposes of the Act's employee-protection provisions.

This contention finds no support in the Act or in judicial interpretation thereof. The Commission's power to find a joint employment relationship between the employees of a railroad service agency and the group of carriers which created the agency—precisely the situation here—is recognized. *Railway Labor Executives' Association* v. *United States,* 216 F. Supp. 101 (E.D. Va.); cf. *McComb* v. *Southern Weighing & Inspection Bureau,* 170 F. 2d 526 (C.A. 4); *Walling* v. *Western Weighing & Inspection Bureau,* 160 F. 2d 47 (C.A. 7). While for some regulatory purposes it may be convenient to regard AJT as a carrier or employer in its own right, that should not be allowed to obscure the undeniable fact that ultimate control of the employment relationship lies with the parent carriers. (J.S. 30a.) The Commission, therefore, was entitled to find that L&N owes AJT's employees the duties of an employer under § 5(2)(f).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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